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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

UNITED STATES OF AMERICA,
Petitioner,

v.

WINSTAR CORPORATION, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit

BRIEF OF AMICI CURIAE WATTS HEALTH FOUNDATION, INC. AND BEYOND SHELTER, INC. IN SUPPORT OF RESPONDENTS

PETER J. GREGORA *
KENNETH R. HEITZ
DANIEL P. LEVLER
DELL & MANELLA LLP
1800 Avenue of the Stars
Suite 900
Los Angeles, California 90067
(310) 277-1010
Attorneys for Amici Watts Health Foundation, Inc., Beyond Shelter, Inc.

* Counsel of Record

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INTEREST OF AMICI CURIAE

Amici curiae, Watts Health Foundation, Inc. ("Watts Health") and Beyond Shelter, Inc. ("Beyond Shelter"), file this brief to emphasize the impact of this case upon the thousands of non-profit corporations who contract with the federal government to provide vital healthcare and social services to the neediest segments of our population. *Amici* are not wealthy financial institutions. Unlike the savings and loan associations who are parties to this case, these non-profit entities lack the financial resources to engage in protracted litigation with the United States over breaches of contract resulting from legislative action. Nonetheless, the very nature of the services *amici* provide subject them to the same risk of loss from contracts terminated by legislative fiat.

Not every federal government contract is put at risk by the positions advanced by Petitioner. However, every contract involving politically sensitive subject matter, whether it be Medicare, welfare, defense spending or an "S&L crisis," can be effectively rendered illusory by Petitioner's arguments. The nature of the services provided by *amici*, make them and the thousands of organizations like them, vulnerable to shifts in the political winds. Of necessity, these organizations must navigate in changing regulatory waters. Petitioner's position, however, would take that regulatory uncertainty to an extreme by giving the government the power to destroy vested contract rights, the benefits of which have already been received by the government, without even recourse to damages whenever a new statute is deemed to be "regulatory."

Amicus Watts Health is a non-profit corporation headquartered in South Central Los Angeles. Watts Health rose from the ashes of the 1965 Watts riots. Its purpose is to provide accessible, quality health care where none is otherwise available. Today Watts Health provides medical and dental services to more than 200,000 people annually. It operates the Watts Health Center, a 60,000 square foot primary care clinic. The center is by far the largest health clinic in South Central Los Angeles and one of the largest community health clinics in the country. Watts Health also operates the United Health Plan, one of five minority owned and operated HMOs in the United States, which provides comprehensive medical care to 90,000 members. Watts Health's fleet of 13 mobile health care units is one of the largest in the nation and provides medical services and inoculation programs to homeless patients and neighborhoods which lack nearby health care facilities. Watts Health also provides adult day care, substance abuse and pre-natal care programs to a disadvantaged patient population.

Watts Health contracts directly with a number of federal agencies such as the Department of Health & Human Services and the Veterans Administration. The contracts

range from master Medicare reimbursement contracts to grant contracts for the development of innovative test programs. While not for durations as long as the S&L assistance agreements to which this case relates, these contracts share the common trait that Watts Health generally has rendered substantial valuable services and consideration to the federal government prior to the receipt of payment. Thus, if as Petitioner urges, a legislative change can excuse government performance without recourse to a damage remedy, the financial consequences to Watts Health could be devastating.

Amicus Beyond Shelter is a much smaller and more narrowly targeted non-profit corporation. Beyond Shelter was founded in 1988 with the goal of filing a critical need in breaking the cycle of homelessness for families: successfully moving homeless families from emergency shelters and transitional housing into permanent housing. Beyond Shelter establishes working relationships with private sector landlords, negotiates leases, and provides case management services to these families for up to one year to help them develop the disciplines needed to become stable tenants. In addition, Beyond Shelter has renovated a slum building into permanent, service-enriched, housing for 41 families and is presently helping develop three other projects which will provide permanent housing for 110 additional families. Beyond Shelter operates a national technical services program to inform and train organizations from other communities in the techniques it has refined over the years. Since its formation, Beyond Shelter has helped over 800 families break the cycle of homelessness. In 1996, the Department of Housing and Urban Development awarded Beyond Shelter one of 25 National Excellence Awards and National Alliance to End Homelessness named Beyond Shelter the Recipient of its 1996 Nonprofit Sector award.

Beyond Shelter contracts directly with the federal government, most frequently the Department of Housing and Urban Development. In addition, it often is awarded

subcontracts from California state agencies or larger non-profits to perform services under master contacts with federal agencies. Beyond Shelter is engaged by these federal agencies to administer homeless assistance programs, to police fraud in such assistance programs and to oversee Section 8 housing benefits. In addition, Beyond Shelter contracts with federal agencies to develop test housing programs for widespread use by many agencies. Beyond Shelter is a small organization with less than 30 employees. When it enters into large, long term federal contracts, it must engage employees and sometimes even lease additional space to perform its obligations effectively. Under the rule urged by Petitioner, any new "regulatory" law relating to the subject matter of Beyond Shelter's long term government contracts would entitle the government to repudiate its contracts without cost—leaving Beyond Shelter with substantial obligations and unneeded space.

The government makes two assertions which undermine the binding effect of government contracts and are of particular concern to *amici*. First, it asserts that contracting parties cannot recover breach of contract damages from the government arising from subsequent legislative action unless the contract expressly contains two talismanic promises: A promise that the policy in question will not be changed and, then, a second promise that the non-government contracting party will be immune from any such change. Petitioner's Brief at 12, 22-23, 26. Second, the government contends that any contract with a federal agency can be annulled by Congress (without compensation) unless the statute delegating contracting authority to that agency authorizes the agency to limit future acion by Congress. Petitioner's Brief at 12-13, 36-37.

The contracts *amici* have entered into with federal agencies do not contain the dual promise language the government now contends is necessary to make federal contracts enforceable. *Amici* seriously doubt whether any of the thousands of contracts routinely entered into for

the provision of health care and social services utilize such language. And, to *amici's* knowledge, no statute delegating contracting authority to any agency with which *amici* contracts permits that agency to limit the future authority of Congress. Accordingly, if the rule urged by the government is adopted by this Court, it will provide the potential to significantly harm contracting parties such as *amici* who fully perform their obligations to the government while creating an undeserved economic windfall to the government.

Amici respectfully urge the Court to affirm the opinion of the Federal Circuit.

SUMMARY OF ARGUMENT

I. Much of the government's argument is premised upon what it calls the "unmistakability doctrine". Asserting that a surrender of sovereign rights will not be found unless such intent "unmistakably appears", the government appears to argue that the normal rules of contract interpretation should be suspended in favor of a result-oriented approach which invariably reaches a conclusion in favor of the government.

Amici take issue with this effort to rewrite long-established principles of contract interpretation. All binding contracts necessarily involve some surrender of sovereignty. The requirement that the surrender of sovereign rights must "unmistakably" appear goes only to the quantum of proof required to establish the parties' intent; it does not modify the basic principles utilized by courts to construe contracts. In the context of parties who contract with the government to provide services in politically volatile areas, such as medicare or welfare, the potential for the government to abuse such result-oriented rules of interpretation is particularly great and particularly unfair.

Amici believe that three contentions made by the government with respect to interpreting the parties' contracts

illustrate how the unprecedented positions taken by the government have the potential to destabilize the fundamental commercial relationship between the government and private contract parties. First, the government's contention that the implementing resolutions were not incorporated by reference into the contracts contradicts the language of the contracts themselves, as well as unquestioned principles of contractual interpretation. Second, the government's contention that it would be rational for plaintiffs to enter into a transaction whereby their future survival depends upon the government's unfettered discretion abandons the ultimate principle of contractual interpretation—common sense. Finally, the government's suggestion that the "unmistakability doctrine " can only be satisfied if the government makes two promises—a promise to provide the consideration, and a second promise not to take it away—is inconsistent with this Court's prior decisions, as well as fundamental principles of contract interpretation.

II. The government's second argument is that the contracts at issue were *ultra vires* because the statute delegating the authority to make contracts to the former Federal Home Loan Bank Board (the "Bank Board") did not expressly state that the Bank Board had the authority to limit the future discretion of Congress. If accepted, this argument would render all federal contracts subject to cost-free Congressional repudiation, since the allegedly required language appears in no federal statute.

III. The government's final argument is premised upon the sovereign acts doctrine. *Amici* join in Respondents' arguments on the merits of this issue. However, we do note that acceptance of this argument would not relieve the government of liability in this case. If the government were to avoid contract liability under the sovereign acts doctrine, it would remain liable for restitution of the benefits which plaintiffs have conferred upon the government.

ARGUMENT

As the issues are presented in Petitioner's Brief, the significance of this case extends far beyond the mere question of whether certain financial institutions are entitled to compensation for Congress' repudiation of their contracts with the Bank Board. The government's arguments call into question the enforceability of virtually every contract entered into by an agency of the United States government.

Invoking "essential attributes of sovereignty" (Petitioner's Brief at 37), the government claims that any contract which is asserted to restrict the future action of the government cannot be so construed (or, if it is so construed, cannot be enforced) unless it satisfies a panoply of rigid requirements—requirements which are seldom, if ever, satisfied by any contract entered into by the government. The consequence of accepting the government's position in this case is to hold that virtually every contract entered into by the United States (excepting only debt obligations)[1] is illusory, and cannot be enforced if the United States government chooses to repudiate it in the wake of subsequent legislative action.

The concerns of *amici* are far from hypothetical. An example from recent headlines is illustrative. Beyond Shelter contracts directly with federal agencies to administer housing assistance programs services which fall within the political rubric of "welfare." There have been proposals in Congress to transfer administration of all welfare programs from federal agencies to the states under block grants. Under Petitioner's theory, such a "regulatory" change would entitle the government to re-

[1] The government acknowledges that its arguments do not apply to "purely financial contractual obligations." Petitioner's Brief at 41. Presumably, this concession is made in recognition of the financial consequences of taking any other position. Even here, however, the government has defined "purely financial" obligations in such a limited fashion that the term may only apply to public debt. See Petitioner's Brief at 41, note 34.

pudiate (without cost) every existing long term contract to provide welfare services that non-profit corporations such as *amici* have entered into directly with federal agencies.

Such a position is troubling to *amici*, who expend millions of dollars every year in reliance upon the contractual commitments of the United States government. It should also be troubling to this Court. If the government's arguments concerning "sovereignty" are correct, then the United States government effectively lacks an essential element of sovereignty—the ability to enter into binding contracts.

In this brief, *amici* will attempt to explain why the government's position is unfounded. Preliminarily, *amici* will briefly discuss certain basic principles applicable to the powers and obligations of the United States government when it enters into contracts. We will then discuss certain of the positions taken by the government and explain why those positions are erroneous.

I. BASIC PRINCIPLES.

It cannot be doubted that the United States government has the power to enter into binding contracts. "When the United States, with constitutional authority, makes contracts, it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments." *Perry v. United States*, 294 U.S. 330, 352 (1935). See also, *Lynch v. United States*, 292 U.S. 571, 579 (1934) ("When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."); *The Sinking Fund Cases*, 99 U.S. 700, 719 (1879) ("The United States are as much bound by their contracts as are individuals.")

It is the nature of every governmental contract that it restricts the freedom of the government to do that which the contract prohibits. This voluntarily assumed limitation upon the government's freedom of action does not denigrate from its sovereinty. To the contrary, "[i]t is of the essence of sovereignty to be able to make contracts and give consents bearing upon the exertion of governmental power." *United States v. Bekins*, 304 U.S. 27, 51-52 (1938). See *Perry v. United States*, 294 U.S. at 353 ("[T]he right to make binding obligations is a competence attaching to sovereignty.").

These principles are (or should be) self-evident. Yet, in invoking the talisman of "sovereignty", the government appears to lose sight of the fact that it necessarily surrenders some element of its sovereignty every time it enters into a contract. That is the nature of a binding obligation. Without such a surrender of sovereignty, the government of the United States could not function.

II. APPLICATION OF THE "UNMISTAKABILITY DOCTRINE" DOES NOT REQUIRE THIS COURT TO DISREGARD FUNDAMENTAL PRINCIPLES OF CONTRACT INTERPRETATION.

The government devotes a large portion of its brief to what it chooses to call the "unmistakability doctrine", although that term has never been used by this Court. This supposed "doctrine" is founded upon language in this Court's decisions to the effect that "sovereign power . . . will remain intact unless surrendered in unmistakable terms." *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986) ("*POSSE*") (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982)); *United States v. Cherokee Nation*, 480 U.S. 700, 707 (1987).

This Court's statement is *POSSE* merely reiterates "this Court's often-repeated admonitions that contracts should be construed, if possible, to avoid foreclosing exercise of sovereign authority." *POSSE*, 477 U.S. at 52-53. Dissatisfied with this simple principle, the government has constructed an entire "unmistakability doctrine", complete

with subsidiary principles, nuances and rules of application. According to the government, the "unmistakability doctrine" is "a rule governing contract interpretation" (Petitioner's Brief at 21) which (apparently) trumps all other rules of contract interpretation,[2] and thereby compels the desired conclusion.

Not so. The rules of contract interpretation do not change merely because the United States is one of the contracting parties. *Reading Steel Casting Co. v. United States*, 268 U.S. 186 (1925) ("The contract is to be construed and the rights of the parties are to be determined by the application of the same principles as if the contract were between individuals.") Any requirement that the surrender of sovereignty be "in unmistakable terms"[3] merely goes to the degree of proof required. Such a requirement does not change the long established principles of contract interpretation; nor does it change the requirement that public contracts—even those with presumptions in favor of the government—must be given "a fair and reasonable interpretation." *Russell v. Sebastian*, 233 U.S. 195, 205 (1914).

The extent to which the government has strayed from long established precedents concerning contract interpretation presents a distinct threat to organizations, such as *amici*, which contract in politically volatile subject matters. Inevitably, the government will have more opportunities to trot out these new and aggressive rules of contract interpretation against entities like *amici*. The government's arguments regarding the interpretation of

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[2] See Petitioner's Brief at 12, where the government refers to "ordinary principles of contract interpretation" and then concludes that its desired result follows *a fortiori* under the "unmistakability doctrine."

[3] *Amici* take no position on whether there is any requirement of "unmistakability" in the present context. Our argument assumes that there is such a requirement.

the Glendale Federal contract[4] demonstrate how far it is willing to extend newly-minted rules of contract interpretation. Under all known rules of contract interpretation, the government is wrong. A few examples suffice to make the point.

A. Incorporation by Reference.

In concluding that the Bank Board's Resolution 81-710 was a part of the Supervisory Action Agreement ("SAA") entered into between Glendale Federal and the Bank Board, the Federal Circuit relied, in part, upon the integration clause in the SAA, which referred to "any resolutions or letters issued contemporaneously herewith" as part of the "agreements and understandings of the parties in connection herewith"—agreements and understandings which were not superseded by the SAA. *Winstar Corp. v. United States*, 64 F.3d 1531, 1540-1541 (Fed. Cir. 1995).

The government strongly disagrees with this conclusion. Although conceding that the SAA "incontrovertibly refers to the Bank Board Resolution" (Petitioner's Brief at 23), it asserts that this fact "does not suggest that the terms of the Bank Board Resolution were transformed by the SAA into contractual commitments of the government." Petitioner's Brief at 24.

The government is simply incorrect. "Where a writing refers to another document, that other document, or so much of it as is referred to, is to be interpreted as part of the writing." 4 *Williston on Contracts*, § 628 (3d Ed. 1961). In this case, however, the language of the SAA was much clearer. It not only referred to the Resolution, it also expressly identified the Resolution as one of the "agreements and understandings of the parties in connec-

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[4] We will discuss only the interpretation of the Glendale Federal contract because that is both the largest contract and the simplest.

tion herewith."[6] Nothing could be clearer. The parties identified the Resolution as part of the SAA "in unmistakable terms."

B. The Surrounding Circumstances.

The Federal Circuit also relied upon "the circumstances surrounding the transaction" in determining the Glendale Federal's right to amortize supervisory goodwill was a bargained-for element of the contract. Specifically, the Federal Circuit noted that the transaction would be senseless unless the Bank Board had committed to permit supervisory goodwill to be used, since "no healthy thrift would consummate a transaction that immediately put it in regulatory noncompliance." *Winstar*, 64 F.3d at 1542. This consideration of surrounding circumstances is an appropriate method of interpreting the contract. I *Farnsworth on Contracts* § 7.10 (1990) ("The overarching principle of contract interpretation is that the court is free to look to all the relevant circumstances surrounding the transaction.").

The government disagrees, asserting that it was entirely rational for Glendale Federal to wager its very existence on the hope that neither Congress nor the Bank Board would change then-current policy regarding goodwill, because (1) it was reasonable to believe that the Bank

[5] The integration clause of the SAA states:

> "This Agreement . . . constitutes the entire agreement between the parties thereto and supersedes all prior agreements and understandings of the parties in connection herewith, excepting only the Agreement of Merger and any resolutions or letters issued contemporaneously herewith by the [Bank Board] or the FSLIC."

The integration clause only purported to supersede "all prior agreements and understandings of the parties". There can be no explanation for excepting the Resolution from the operation of this clause unless it fell within the general description of the matters which would otherwise be superseded, *i.e.*, the "agreements and understandings of the parties." Thus, the SAA itself clearly identifies the Resolution as representing an agreement between the parties.

Board was unlikely to change its capitalization policies quickly (Petitioner's Brief at 26-27),[6] and (2) there were a "number of immediate benefits" to Glendale Federal which would justify such a risk. *Id.* at 27.[7] Bluntly stated, this assertion defies credulity.

In the real world, it is inconceivable that any healthy profitable institution (which Glendale Federal was) would voluntarily place itself in a position where shifting political winds could cause politicians and politically sensitive bureaucrats to throw it into receivership on a moment's notice. That would be the height of fiscal irresponsibility. In virtually identical circumstances, this Court construed a contract between a city and a street railroad as not permitting the city to unilaterally change the agreed-upon fares:

[6] Th questionable nature of this assertion is demonstrated by the fact that the government reached precisely the opposite conclusion only a few paragraphs earlier. In arguing a different point, the government contended that "in light of the frequency with which federal capital requirements had changed in the past . . . it would have been unreasonable for Glendale, FSLIC or the Bank Board to expect or rely upon the fact that those requirements would remain unchanged." Petitioner's Brief at 26. Thus, within a single page, the government asserts: (1) it would be reasonable for Glendale Federal to gamble its entire existence upon the continuation of the rules regarding supervisory goodwill; and (2) it would be unreasonable for Glendale Federal to expect that those rules would not change. Apparently, the reasonableness of Glendale Federal's expectations changes according to the argument which the government is making at the moment.

[7] Oddly, the principal "immediate benefit" which the government identifies is that acquisitions of insolvent thrifts were "tempting to other [thrifts] attempting to stave off accounting insolvency. . . ." Petitioner's Brief at 27, fn. 20. The peculiar aspect of this supposed "benefit" is that it is completely inapplicable to this case. It is undisputed that Glendale Federal was not "attempting to stave off accounting insolvency"—it was a "profitable thrift, which was in full regulatory compliance." *Winstar*, 64 F.3d at 1536. Thus, the government has been unable to identify any "immediate benefit" to Glendale Federal which would explain why it would be willing to take the risk which the government claims it took.

> It would hardly be credible that capitalists about to invest money in what was then a somewhat uncertain venture while . . . [contracting for the right] to charge a rate then deemed essential for the financial success of the enterprise, would at the same time consent that such rate then agreed upon should be subject to change from time to time by the sole decision of the common council.

Detroit v. Detroit Citizens' Street Railway Co., 184 U.S. 368, 385 (1902).

What was "hardly . . . credible" in the *Detroit Citizens'* case is absolutely incredible here. It defies logic to argue, as the government does, that Glendale Federal could rationally have entered into the SAA without a commitment that it could use supervisory goodwill to satisfy regulatory capital requirements.

C. "Dual Promises."

Throughout its Brief, the government appears to attach significance to the fact that the Bank Board's commitment to permit Glendale Federal to use supervisory goodwill did not say that the commitment could not be revoked in the future. See, *e.g.*, Petitioner's Brief at 12 (contract does not contain promises that "goodwill will continue to be counted"); *Id.* at 23 ("no promises were made that policy would not be changed"); *Id.* at 26 ("Nothing in the language of the Resolution committed the Bank Board or Congress to continue to treat goodwill as an asset for purposes of satisfying federal capital requirements in the future.").

Such an argument has no weight. When a promisor has agreed to provide a benefit, it is unnecessary to require a second agreement that the promisor will not take the benefit away. This Court rejected such a "second promise" argument in *St. Anna's Asylum, etc. v. City of New Orleans*, 105 U.S. 362 (1882). In response to the City's argument that the contractual grant of a tax exemption could be withdrawn because the contract did not expressly provide that it could not, this Court stated: "The addition of a declaration, that the exemption given should not be withdrawn, would not have added to its force." *Id.* at 369. See also *Murray v. Charleston*, 96 U.S. 432, 445 (1878) ("A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity.")

In this case, the government promised that certain thrifts would be permitted to use supervisory goodwill. This promise did not become any less binding because the contract failed to say "and we really mean it."

III. THE IMPLICATIONS OF THE GOVERNMENT'S *ULTRA VIRES* ARGUMENT.

The government also advances the argument that any agreements made by the Bank Board to permit institutions to use supervisory goodwill would be *ultra vires* because Congress did not expressly delegate to the Bank Board the authority to bind future Congresses not to change the rules. Petitioner's Brief at 36-43. Other than to join in Respondents' arguments, *amici* will not comment on the substance of this argument. However, this Court should seriously consider the full implications of the government's position.

The government appears to argue that Congressional abrogation of a contract between an agency and a private citizen could only give rise to contractual liability if Congress had expressly granted the agency the power to limit the future authority of Congress. Petitioner's Brief at 12-13, 36-37, 39. To the knowledge of *amici*, no statute of the United States has ever contained such a provision. Certainly, the government has not cited any such statute. This is of serious concern to *amici* because there is no discernible difference between the statute that authorized the thrift regulators to enter into contracts with Respondents, and the various statutes that authorize officials from the Department of Health and Human Services, the De-

partment of Housing and Urban Development, and the Veterans Administration to enter into contracts with organizations like *amici*.[8]

The implications of the government's position are therefore quite serious. The government is here saying that abrogation of agency contracts by Congress can never result in liability to the United States. Thus, if Congress wishes to materially change policy in a particular area, it can simply nullify all contracts implementing the prior policy and pass off a material portion of the costs of the policy change upon innocent private parties who had the misfortune to contract with the government at the wrong time. In effect, the government would have partially funded its policy change with an arbitrary "tax" consisting of the losses imposed upon private parties by the government's cost-free repudiation of its contracts.[9]

The government's position is of serious concern to *amici*, who contract with the government in such politi-

[8] The contract authorization provisions of the statutes which apply to medical and social service virtually mirror the statutes at issue in this case. *Compare* 12 U.S.C. § 1725(c)(3) (1988) (repealed) (FSLIC "shall have the power . . . to make contracts") with 42 U.S.C. § 241(a)(7) (1994) ("[T]he Secretary [of Health and Human Services] is authorized to . . . enter into contracts"); 42 U.S.C. § 8144 (1988) ("The Secretary [of Housing and Urban Development] is authorized to . . . enter into contracts"); 38 U.S.C. § 513 (1994) ("The Secretary [of the Veterans Admniistration] may . . . enter into contracts or agreements with private or public agencies or persons").

[9] The government frankly admits that this is its intention, when it argues against "a governmental obligation to pay substantial damages as the price for exercising regulatory authority. . . ." Petitioner's Brief at 21. Characteristically, the government has considered only its own interests. What the government fails to acknowledge is that somebody must bear the loss when the government repudiates its contract with a private party; if the government does not pay compensation, then the private party suffers losses by reason of the government's refusal to perform. The government never identifies any reason why the costs of the government's change in policy should arbitrarily be borne by private parties whose only offense was that they were naive enough to believe that a contract meant something.

cally sensitive areas as health care and shelter for the homeless. An abrupt change in government policy in these areas is always a possibility. If the government can freely (and without cost) repudiate all contracts entered into under the prior policy, *amici* and many other non-profit corporations may suffer severe losses.

IV. IF THE GOVERNMENT PREVAILS UNDER THE SOVEREIGN ACTS DOCTRINE, IT IS LIABLE TO THE PLAINTIFFS FOR RESTITUTION.

The government's third argument to this Court is that the sovereign acts doctrine excuses it from performance of its obligations to the plaintiffs in this case. *Amici* join in the arguments advanced by Respondents on the merits of this contention. However, we believe it is also important to note that application of the sovereign acts doctrine only relieves the government from liability for contract damages and not from liability for restitution.[10]

The sovereign acts doctrine separates the government's status as sovereign from its status as contracting party. If, in its capacity as sovereign, the government passes a law of general application which prevents performance under a contract, the government, as contracting party, may use the existence of such law as a defense to contract liability to the same extent as it could if it were not the sovereign. *Horowitz v. United States*, 267 U.S. 458 (1925).

The government correctly notes that the sovereign acts doctrine, if applicable, would permit it to assert the defenses of impossibility or supervening illegality and thereby avoid liability for breach of contract. Petitioner's Brief at 43-44. However, that defense to contractual liability would not defeat the government's liability to

[10] Under some circumstances, restitution may also be used as a remedy for breach of contract. III *Farnsworth on Contracts* §§ 12.20 (1990).

Respondents in this case. The government would remain liable to Respondents for restitution of the benefits they conferred upon the government.

This basic principle was stated by Professor Corbin as follows:

> Even though such a kind and degree of impossibility exists as to discharge a defendant from further legal duty, the law does not permit him to retain the benefits of a performance rendered by the plaintiff.
>
> * * * * *
>
> In cases like these, the plaintiff can not get specific performance and has no remedy in damages. He loses, without recourse, the benefits and profits of the bargain; but he has a right to the restoration of whatever the defendant may have received from him under the contract.

6 *Corbin on Contracts* § 1368 (1962). To similar effect: *Restatement (Second) Contracts* §§ 272, 371 (American Law Institute 1979).

In the Glendale Federal case, for example, Glendale Federal conferred a benefit upon the government of three quarters of a billion dollars when it merged with an insolvent thrift and assumed liabilities which would otherwise have been paid by the government. *Winstar*, 64 F.3d at 1536. That assumption of liabilities occurred pursuant to the contract which the government now seeks to avoid under the sovereign acts doctrine. If the government is successful in avoiding liability under the contract, it is not entitled to keep the monetary benefit it received under the unenforceable contract; it must refund that money to Glendale Federal.

CONCLUSION

For the reasons stated, the judgment below should be affirmed.

Respectfully submitted,

PETER J. GREGORA *
KENNETH R. HEITZ
DANIEL P. LEFLER
IRELL & MANELLA LLP
1800 Avenue of the Stars
Suite 900
Los Angeles, California 90067
(310) 277-1010
Attorneys for Amici Watts Health Foundation, Inc., Beyond Shelter, Inc.

* Counsel of Record